EX PARTE OR LATE FILED

October 26, 2000

RECEIVED

OCT 26 2000

FCC MAIL ROOM

THE ASPEN INSTITUTE

COMMUNICATIONS & SOCIETY PROGRAM

Charles M. Firestone
Executive Director

Amy Kozzick Garmer
Associate Director

Patricia F. Katopol
Program Associate

Hon. William E. Kennard, Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360

Dear Mr. Chairman,

In connection with the above referenced proceeding, I am pleased to enclose a copy of *Digital Broadcasting and The Public Interest* as informal comments to the Commission's Inquiry. This 1998 Aspen Institute publication contains papers and essays aimed at helping the President's Advisory Committee on the Public Interest Obligations of Digital Broadcasters consider how to think about "public interest" obligations for this new medium, recognizing the differences between now and the time when the broadcast licensing scheme was originally conceived. It includes not only a report on the discussions sponsored by the Aspen Institute among leaders and experts with a variety of viewpoints on the topic, but also some legal background papers on the applicability and/or legal justification and appropriateness of obligations historically justified in the era of scarcity.

I am also enclosing a paper that I wrote in connection with the above activity entitled "The Spectrum Check Off Alternative to Public Interest Regulation of Broadcasters." In it, I explore another approach to assessing public interest obligations – a market approach that values the spectrum and then allows broadcasters to deduct from a government imposed spectrum assessment the value of programming or spots aired that the government determines is in the public interest. This might include public service announcements, free time for candidates on an equal opportunities basis, or certain children's television programs. It would be up to the government to determine what categories of programming would qualify for check-off status. This approach would not violate the First Amendment, because this would be the equivalent of Government Speech, paid for by the value of the spectrum the government leased out. And the broadcaster would be free to air as much or as little of this prescribed category of programming as it chose. For those who choose not to air the programming, they would simply pay the fair market value of their spectrum. I think this approach is worth considering in connection with this Inquiry.

The Aspen Institute Communications and Society Program, of course, takes no position on the ultimate resolution of this proceeding. We simply hope these tools will aid in thinking through the issue.

Respectfully submitted,

Charles M. Firestone

One Dupont Circle, NW

Suite 700

Washington, DC 20036-1133

PH 202.736.5818

FX 202.467.0790

www.aspeninstitute.org/css

firestone@aspeninstitute.org

garmer@aspeninstitute.org

katopol@aspeninstitute.org

No. of Copies rec'd 0
List A B C D E

Cc: All Commissioners
✓ Magalie Salas, FCC Secretary

The Spectrum Check Off Alternative to Public Interest Regulation of Broadcasters

Charles M. Firestone
The Aspen Institute
Communications and Society Program

The Spectrum Check Off is an alternative to current broadcast program regulation that would provide a marketplace value to the public interest standard. Simply, broadcasters would be charged the fair market value of their spectrum on an annual basis, determined by shadow auctions, auctions of the lowest rated station in the market, or some other appropriate process. This charge might be called the "Annual Spectrum Fee." The broadcaster would then be able either to pay such fee to the Government or to "check-off" (reduce) up to the full value of the Annual Spectrum Fee by airing programs or spots from categories that the Government, i.e., Congress or the FCC, determines is in the public interest. Those public interest programs could be, for example, educational programs for children, free political spots on an equal opportunities basis, public service announcements, or other programming that the Government wants to pay for in the value of reduced spectrum fee payments. The value assigned to the programs would likely be at cost for program length material, or the station's lowest pre-emptible rate for that time spot or period for spot announcements, political commercials under Section 315, or public service announcements.

More specifically, to implement this approach, the Federal Government (through the Federal Communications Commission or the Commerce Department) would lease the use of the spectrum to a broadcaster for an amount to be determined each year by formula. The lease could be for a period longer than ten years so long as the Annual Spectrum Fee was recalculated at least every ten years. Perhaps the lease would be renegotiated every fifteen years like cable franchises are. As is common in leasehold arrangements, broadcaster-lessees could assign the lease subject to approval of the assignee by the lessor-Government. The broadcaster could also be sued for non-performance of the lease. To avoid a major mistake that was made in the cable franchising process, the money that is collected from Annual Spectrum Fees, if any, would be used for public interest communications purposes, e.g., to foster public interest programming on public broadcasting stations or to purchase time on other commercial stations for such programming.

The advantages of the Spectrum Check-Off Alternative are several: First, it provides a specific dollar value to the trade-off that has traditionally marked the public trusteeship theory of broadcast regulation. That is, for the initial grant and/or exclusive use of a valuable frequency, protected against interference or encroachment by governmental enforcement mechanisms, the broadcaster serves the needs and interests of the local audience service area. For over 70 years the Federal Government has tried to explicate what that public service requirement consists of.

The Spectrum Check-off Alternative at least determines a dollar value to the exchange, and gives the broadcaster the choice either to pay for the spectrum or continue the public trusteeship bargain--and to decide, at the broadcaster's discretion, just how much of each it wants to do. It is also rather easily administered, as the broadcaster would know the Annual Spectrum Fee due, total its "check-offs" for the year, and pay any difference to the government in the following quarter. Alternatively, the Government could require an advance deposit and refund the amounts "checked-off." Difficulties of determining the value of the time and the validity of the choice of programming for the public interest category are discussed below.

Throughout the past 70 years of regulation, there have been First Amendment overtones and tensions in the public trusteeship scheme of regulation. Under the Spectrum Check Off, the government can determine what categories of programming it wants to promote as a matter of public policy and governmental speech. The broadcaster can then exercise its discretion whether or not to air anything in those categories at all or pay the fair market value of the spectrum on an annualized basis. And if the broadcaster decides to air such programming, it can exercise its journalistic discretion as to just what programs, spots, or types of material reasonably fit into those categories. If the program does not fit, according to the Government, the broadcaster need not air it.

The scheme is market oriented, can transfer across any governmental allocation of electromagnetic spectrum or other forms of largesse, and preserves core First Amendment freedoms for the speaker/producer. Nevertheless, it poses several problems in its implementation, which would need Congressional revision of the Communications Act of 1934 as amended.

First, the value of the Annual Spectrum Fee needs to be determined. The auction approach is most likely the best determinant of the value of the particular spectrum. Yet, an outright purchase of the frequency would be both too costly and unlikely to create a fair value over time to the government or the broadcaster. In Todd Bonder's "A 'Better' Marketplace Approach to Broadcast Regulation," 36 Fed. Comm. L. J. 27 (1984) (hereafter, Better Marketplace Approach), which argues for the Spectrum Check Off approach, the author suggests auctioning the least viewed station in a market, and allowing the incumbent first choice in meeting that price. All other stations in the same market would have the same value assigned to their spectrum, as this would value the spectrum alone ("stick price") and eliminate the value that other stations have achieved from their successful operations in gathering audiences for their programs.

Most likely the best approach would be a ten or fifteen year lease, with a fee annualized over those years, after which a new auction would take place in that particular market. Alternatively, the least viewed station in the market could be auctioned every year -- thus setting each year's price -- or every two years, etc., for the duration of the lease. By taking a lease approach, the Government could also lease the spectrum in a given market much like a shopping center, and recognize that some stations might specialize in one type of public interest programming and others in other types.

There is a serious problem with this if all stations in a market are charged the same for their spectrum, as proposed above. In that case, smaller and newer stations, who do not command high advertising rates are at a significant disadvantage as against the large commercial stations, who will be able to discharge their spectrum charge obligations rather handily with the high value of their advertising time. If this became a serious problem, the new broadcaster could get a waiver of 2/3 value the first year, 1/3 value the second, and pay the full amount in the third. It is likely that a new broadcaster would have significant time to fill with public service programming in any event. Second, the value of the time on the station needs to be determined and verified. It is recommended that the value of the program or spot should be that charged to other "most favored sponsors" -- essentially the lowest unit rate, as defined by the political broadcasting rules long in place at the Federal Communications Commission. In this case, if a public service announcement were aired during prime time, it would be valued at the lowest rate for that time slot, and if at 3:00 a.m., it would receive the same treatment for that time slot. In each case, the time would be at the lowest pre-emptible rate, eliminating the most significant problem with the operation of the political broadcasting rules -- the need at times for politicians to purchase non-pre-emptible rates at significant premiums.

Third, the question arises how the station will be judged in its selection of material to fit within the government selected categories of public interest programming. Since this is, essentially, governmental speech, the government would be entitled to be quite specific about the type of programming it wants to pay for, so long as it does not favor a particular party or otherwise breech First Amendment requirements for governmental speech. For example, it might select candidate programming of certain duration, with certain requirements, but with a provision of no censorship by the station, equal opportunities for all candidates for the same office, and other such restrictions as currently apply under Section 315 of the Communications Act. Or it might provide for Public Service Announcements so long as they are on behalf of a tax-exempt (501(c)(3)) or governmental organization and are non-partisan. Children's educational programming is also subject to rather extensive governmental definition after certain broadcasters appeared to abuse the definition in the early 1990's.

Since this is governmental speech, the courts would likely be very lenient about the degree to which the government can "contract" for quality and program content type. This would be very important, as one of the most significant objections to this approach is the charge that broadcasters would "game the system," and choose to air the cheapest fare available. Several such "games" come quickly to mind: cheap fare for children's educational programming, or alternatively, very commercial programs that are categorized by the broadcaster as "educational." Secondly, the broadcaster could abuse what it called public service announcements.

But with a lease payment approach, these concerns can be addressed easier than they are in the current regulatory system. First, for program length, educational programming for children, the Government could grant check-off credit for the cost of the program but not if the broadcaster sells commercials during the airing of the

program, and not for the value of commercials during that slot. That would enable the broadcaster to purchase the best possible program without regard to its commercial value -- at no real cost except the loss of potential advertising during that slot. In essence, it transfers the entire cost of the program itself to the Government (taxpayers). From the broadcaster's standpoint, it would be the equivalent of having the commercials equal the cost of the program. But it allows the broadcaster to profit in two, albeit rather minor, ways. First, by having no commercials during the educational program fare, it potentially decreases the supply of inventory and therefore increases the value of other commercial time during children's programming on the station. Second, if the educational program were particularly good, the value of spots adjacent to that program would be high. Still, the Government would need to benchmark and place limits on the total amount to be paid for such programs.

As for abuse of the check-off for the value of public service announcements, the time slot should be valued at lowest unit rate for that particular time (2:00 a.m. slot valued at the lowest amount for what a commercial would cost if aired at 2:00 a.m.) The PSA should come from a tax-exempt 501(c)(3) or governmental organization, and be approved by a statewide broadcasters association, as is current practice today.

Another issue is how to value public service efforts that are not strictly programming, such as closed captioning. Here, the government simply determines a value for closed captioning for spectrum check off purposes. If the value is too low, it would not encourage the use of closed captioning, so the amount would have to be fair in order to work. Possibly, like the children's educational fare, it would be a reasonable cost of captioning or the marginal cost of acquiring captioned programming.

All in all, then, the Spectrum Check Off approach is intended to quantify the public interest standard in a way that is both sensitive to broadcasters' First Amendment rights and concerns and to the public's interest in gaining value in terms of programming from the allocation of valuable spectrum space to broadcasters in the first place. While there are certainly problems from both perspectives, it nevertheless serves as a useful vehicle for determining the public interest obligations for broadcasters in the coming Digital Age.

Note: My former UCLA Law student, Todd Bonder, wrote The Better Marketplace Approach law review comment alluded to above. This article explains in much detail and in economic and legal terms the benefits and detriments of this approach. It was written in response to a law review article by then FCC Chairman Mark Fowler and his legal assistant Daniel Brenner which argued for a marketplace approach to broadcast regulation. The first description of this approach is contained in my testimony to the U. S. House of Representatives at the time of the attempted "Van Deerlin Rewrite" of the Communications Act in 1979.

Attachment A

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

o An oversize page or document (such as a map) which was too large to be scanned into the ECFS system.

o Microfilm, microform, certain photographs or videotape.

o Other materials which, for one reason or another, could not be scanned into the ECFS system.

The actual document, page(s) or materials may be reviewed by contacting an Information Technician at the FCC Reference Information Center, at 445 12th Street, SW, Washington, DC, Room CY-A257. Please note the applicable docket or rulemaking number, document type and any other relevant information about the document in order to ensure speedy retrieval by the Information Technician.

Three copies of Digital Broadcasting and the Public Interest